U.S. Department of Labor

Occupational Safety and Health Administration
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June 18, 2009

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Via Federal Express #8696 2181 9319

RE: Metro-North Commuter Railroad Company/Tagliatela/2-6040-08-011

Dear Ms. Barnett:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Ralph Tagliatela (Complainant) against Metro-North Commuter Railroad Company (Respondent) on July 1, 2008, and amended on July 8, 2008, under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. In brief, Complainant has alleged that in retaliation for reporting his on the job injury he was issued a notice of charges and then assessed a five-day deferred suspension. Complainant further alleges that Respondent interfered with his medical plan by assessing discipline for following his doctor's treatment plan and by changing the injury designation from occupational to non-occupational. Additionally, Complainant alleges that Respondent routinely discriminates against employees who report on the job injuries.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

On April 24, 2008 Complainant was served a notice of charges. On May 14, 2008, Complainant's injury classification was changed from occupational to non-occupational. On May 22, 2008, Complainant was assessed a five-day deferred suspension arising from the disciplinary charges referred to in the April 24th notice. On July 1, 2008 Complainant filed his FRSA complaint with the Secretary of Labor. On July 8, 2008 an amendment to the complaint was filed. As the complaint and amendment to the complaint were filed within 180 days of the adverse actions, they are deemed timely.

Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent provides commuter rail service to locations in the states of New York, Connecticut and New Jersey.

Complainant is an employee within the meaning of 49 U.S.C. §20109.

The Metro-North Commuter Railroad Company is a suburban commuter rail service that is a subsidiary of the Metropolitan Transportation Authority (MTA), a public benefit corporation. Metro-North runs service to its northern suburbs in New York and Connecticut, as well as to other regions, including, in conjunction with New Jersey Transit, to parts of New Jersey. Respondent operates 120 stations. Complainant began working for Respondent as a custodian in 2000 and is a member of the Transit Communications Union. During the relevant period of time Complainant was assigned to the Stamford, Connecticut yard and provided custodial services at the stations between Mt. Vernon, New York to Stamford, Connecticut. Maureen Wilhelmy and Maria Kazik are the Operations Supervisors for those stations. Wilhelmy covers the stations from Stamford to New Haven and Kazik covers the stations from Mt. Vernon to Stamford. Complainant's supervisor is Maureen Kazik and his foreman and Lead Custodian is Chris Leavey.

Complainant works the 7:00 AM to 3:00 PM shift. His rest days are Monday and Tuesday. Custodians are responsible for sweeping the platforms with a bucket and broom also known as "finessing" and general cleaning of empty cans or anything else that is observed. During weekend shifts there is no supervisor or lead custodian on duty. On Saturday April 12, 2008, at approximately 1:00 PM while finessing the Mamaroneck station Complainant walked down the handicap ramp onto the dirt ground which is an uneven surface. Complainant twisted his left knee and it buckled. Complainant felt some discomfort and limped for the remainder of his shift. Complainant did not attempt to contact his lead custodian by cell phone to report his injury hoping the minor pain would subside shortly. Complainant completed the two hours remaining in his shift and went home. After arriving home Complainant administered ice and/or BENGAY to alleviate what he considered minor discomfort. Complainant fully expected that the pain would subside by morning and that the injury was minor and temporary. Complainant awoke at 3:00 AM in severe pain. Complainant called the lead custodian, Chris Leavey before leaving his home and advised that he would be going to the Milford Hospital ER, an FRSA protected activity. Leavey called Maria Kazik and Kazik met Complainant at the hospital. According to Metro-North Operating Procedure for Medical Evaluations for On-Duty Injuries NO. 23-003: Employees must report all injuries to their immediate supervisors promptly after they occur and before seeking medical evaluation and treatment. An x-ray was taken and Complainant was treated for a sprain to his left knee and instructed to see his orthopedist. While at the ER Kazik took a brief statement from Complainant on how he hurt his knee while working. Kazik asked Complainant why he didn't report his injury sooner and Complainant replied that he had been experiencing only discomfort earlier in the day and wasn't aware he had an injury. Complainant reported that Kazik accompanied him during the exam and that the doctor advised that with this type of an injury it can take up to two days before the pain gets severe. Kazik denied during her interview that she accompanied Complainant into the exam and therefore, did not hear the doctor's comments. However, Kazik testified at the investigative hearing that she did accompany Complainant during the exam but did not recall the doctor stating this. The hearing is discussed in greater detail below. Complainant left the hospital and returned home. Kazik drove to the New Haven station to write up the initial injury report, known as the Incident Investigation Report (IR1). Kazik advised that this was the first injury reported to her since becoming a supervisor approximately 3 years earlier. Kazik was unfamiliar with the process and reported having no prior training. Kazik did not call her immediate supervisor, Joe Zilembo Director of Stations, to report the injury.

As noted above this was Kazik's first experience with an injury during the performance of duty. Kazik was unaware of Respondent's policy for handling accidents and injuries other than she was to accompany the employee for medical treatment. Upon Kazik's return to the New Haven yard she contacted another supervisor and was told that she needed to complete the Incident Investigation Reports, IR1 and IR2. Kazik was advised to give a Complainant the Post Injury Instructions. Unaware of what that consisted of, Kazik was provided with a copy. Kazik asserts that she read a copy of the instructions to Complainant over the phone. Complainant denies having received the instructions verbally or in writing. The Incident

Investigation and Reporting Manual identifies the supervisor as the most likely person to conduct the investigation and therefore, responsible for reporting the incident as well. It also refers to the Post Incident Management Supervisor's Guide. The introduction in the guide states that it should be kept with important papers and that supervisor's would be issued a wallet-sized card containing important points and phone numbers. Kazik had neither. The guide provides a copy of the post-injury instructions and what to do when an employee is injured on the job during 3rd shift and what to do when an employee does not require medical attention until a later time or date. The guide also states that employees' injuries should be reported promptly and completely. Kazik reported the injury to the Safety Department but she did not report it to Zilembo until after the Monday morning Operations Meeting, more than 24 hours after the injury was reported to her. During the Operations Meeting all incidents and accidents as well as other relevant issues from Friday through Sunday are discussed. Zilembo voiced his concern over Kazik's failings during his recorded interview. No discipline was imposed for Kazik.

Complainant did not go to work on Sunday with the approval of Kazik. Complainant's rest days were Monday and Tuesday. The Post-Injury instructions state, "If you are unable to report to work because of this injury:

- "You must report instead to the Metro-North Occupational Health Service Department.
- "You must report to OHS the first time you are unable to report work because of this injury – whether that is the next workday after the injury or whether several days have elapsed before you are unable to work.

"…Failure to report to OHS will be considered an unauthorized absence unless you are medically unable to travel.

"If you are unable to travel, your treating physician must contact OHS to obtain the forms necessary to document your inability to travel..."

On Monday, April 14, 2008, Angela Pitaro, Metro-North Administrator[1] for OHS faxed documentation to Dr. Weisman and Dr. Amit Lahav, Complainant's orthopedic group, confirming that it pays reasonable and customary medical expenses for causally related problems and approving Complainant's April 15, 2008, 2:00 PM appointment. Complainant was seen by his orthopedist on Tuesday, April 15, 2008 and Dr. Weisman's office faxed a note to OHS stating that Complainant could not return to work or travel to New York until he was re-evaluated on Friday, April 18, 2008. According to Complainant he began to receive harassing phone calls from several individuals on or about April 14, 2008, demanding that he report to OHS despite his doctor's instructions to the contrary. The calls came from his supervisor, Maria Kazik, lead custodian Chris Leavey, and Employee Specialist, Olive Durant. In response to the harassing calls and fear that disciplinary action would be taken for following his doctor's orders not to work or travel to NYC, Complainant advised Chris Leavey on Wednesday, April 16, 2008, that he would be taking leave under the FMLA[2] retroactive to April 13, 2008. Also on April 15, 2008, Complainant notified the Secretary of Transportation – FRA and Metro-North of his April 12, 2008 injury via certified letter, FRSA protected activities. Complainant also filed for FMLA because of Respondent's attendance

[1] Angela Pitaro held the position of Administrator-Occupational Health Services. The Scope of Work document provided by Respondent and dated January 26, 2004 stated, "The Administrator-Occupational Health Services will be an employee of MNR. The Administrator's primary responsibilities, include but not limited to; 1) Managing the terms and conditions of the finalized contract; 2) Developing and implementing procedures, guidelines and goals for the contractor employees; 3) Acting as a liaison between the contractor employees and MNR; and 4) Defining the roles and decision-making parameters of the contractor employees."

[2] Complainant was approved for FMLA for an unrelated health condition prior to the April 12, 2008, injury. Complainant is granted 60 days per year under FMLA regardless of the number of FMLA claims.

policy fearing that his absences due to his work-related injury would lead to unsatisfactory attendance and disciplinary action. Operating Procedure No. 21-021B states that employees are permitted to use sick leave for personal illness or injury. The reference to injury includes work related injuries. "Employees whose use of sick leave days exceeds reasonable levels will be considered as having unsatisfactory attendance. Unsatisfactory attendance includes…"Three occurrences of absences within any thirty calendar day period or four occurrences of absence within any six month period, with an "occurrence" being consecutive work days that an employee does not report for work due to illness or injury." Unsatisfactory attendance for purposes of craft transfers or promotions uses a different formula. Employees are allowed 15 occurrences of absence within 30 months; an absence of several successive days counts as only one occurrence. Also within the 30-month period, employees are allowed eight "patterns" of sick absence. Sick absences that occur immediately before or after the employee's rest days, vacation days and holidays are considered patterns. Approved FMLA and bereavement leave are the only two extenuating circumstances in which the absence would not count against an employee.

In accordance with Respondent's post-injury instructions an employee is required to go to OHS on the first day after the injury that they are unable to work. Complainant did not go to OHS on April 16, 2008, and was marked as a no show despite the note from his physician. At the time relevant to this complaint, Brian Hamway, M.D. was the Medical Director at OHS. The Occupational Health Services department is operated by a contractor of Metro-North. At the time relevant to this investigation the contractor was CHD Meridian. Upon Complainant's failure to show up at OHS, Dr. Hamway called Joseph Zilembo, Director of Stations, and ordered Complainant to OHS for a mandatory visit. Dr. Hamway stated that if Complainant was able to travel to his private physician he was able to travel to NYC. According to Zilembo the call from Dr. Hamway required him to bring charges against Complainant for failing to follow the policy pertaining to OHS. This same day Robin Brown, Manager Lost Time Control, issued a letter to Complainant ordering him to OHS referred to as the Grand Central Terminal Medical Department located in the Graybar Building, 420 Lexington Avenue, New York, New York. Complainant was notified that his failure to attend the scheduled April, 21, 2008, 8:30 AM appointment may result in disciplinary action. Complainant was seen by Dr. Weisman for his follow-up visit on April 18, 2008. Dr. Weisman ordered rest and elevation, continued icing of the area and cleared Complainant for sedentary work only and short distance walking. Complainant claimed that he was not physically able to make the trip to OHS and did not go. Upon Complainant's failure to show up for his scheduled OHS visit, Olive Durant called his home. Complainant alleged that he was told by Durant that FMLA does not cover occupational related injuries. Durant denied having stated this at both the investigative hearing and when interviewed relevant to this complaint. Durant claimed to have informed Complainant that he was not yet approved for FMLA for this injury. Complainant was again ordered to OHS on April 23, 2008, and told that his failure to do so would result in violation of the company policy. Complainant has alleged that he was called many times immediately following his injury and harassed about going to OHS despite his doctor's orders not to do so and despite the fact that he had notified his lead custodian, Chris Leavey, that he was taking time off under the FMLA.

Complainant resides in West Haven, CT. OHS is located in the Graybar Building in NYC. In order to get to OHS Complainant must drive to the West Haven station. Walk from the employee parking lot to the train track. After arriving at Grand Central Terminal Complainant must walk a great distance from the track where he exists the train over to OHS. Dr. Hamway noted in his clinic notes that if Complainant was able to go to his private physician, he was able to get to OHS. Complainant's supervisor, Maria Kazik, advised that this was not the case. She confirmed that it would have been difficult for Complainant to get to OHS. Dr. Hamway's comparison of Complainant driving to his orthopedist and walking the short distance from his car to the doctor's office can not be compared to the physical travel from Complainant's residence to OHS.

In a letter dated Tuesday April 22, 2008 Metro-North was notified by Complainant's attorney, Charlie Goetsch, disciplining Complainant pursuant to his injury would be a violation of FRSA and FMLA.

On April 23, 2008, Complainant went to his appointment at OHS and was examined by Dr. Hamway. Dr. Hamway completed the MD-40 OHS Report Of Visit form and marked off that the injury was occupational and that Complainant was qualified for restricted duty with limited climbing. Dr. Hamway's clinical notes stated that he would approve the MRI. Dr. Hamway also completed MD1 medical form affirming that the injury was caused by Complainant twisting his knee on April 12th while in the performance of his job. The following day on April 24, 2008, Complainant was seen by Physical Therapist, Michael Goonan. The clinical notes state that employee was informed to elevate and ice the left knee and that he was qualified for restricted duty. Dr. Hamway completed the authorization for the MRI and it was faxed to Dr. Weisman's office.

Respondent's progressive disciplinary program includes a verbal warning, a written warning placed in an employee's file, a hearing/investigation/trial to impose more severe discipline, five days suspension, 10-15 days suspension, 45-60 day suspension and ultimately discharge. The suspensions can be deferred and any levels of discipline can be skipped based on the severity of the violation. A deferred suspension remains in the employees file for two years preventing transfer to a new craft or promotion. If a new suspension is imposed the employee serves the prior deferred suspension. The union can not grieve a verbal warning and it doesn't appear that they grieve written warnings. When a supervisor believes or suspects that a violation has occurred they will recommend an investigative hearing. During the hearing witnesses can be called by the charging department, the employee, and/or the union representative. The notice of action can not be signed by any member of management who conducted the initial investigation or will be reviewing the hearing transcript. At the conclusion of the hearing the manager of the department reviews the transcript and decides if the charges should be affirmed and if so what level of discipline should be imposed.

On April 24, 2008, Respondent issued the Notice of Action advising that an investigatory hearing was scheduled in connection to: 1) Violation of General Safety Instructions 200.3 and 200.4 in that Complainant failed to notify his supervisor immediately after allegedly injuring himself while performing his assigned duties on April 12, 2008, at approximately 1:00PM and waiting until approximately 3:15 AM on April 13, 2008 and 2) Failure to follow a written directive from Robin R. Brown, Manager of Lost Time Control dated April 16, 2008 in which you were ordered to report to the GCT Medical Department on Monday April 21, 2008 at 8:30 AM. Zilembo discussed with his supervisors, Wilhelmy and Kazik that the charges needed to be brought. Wilhelmy was the only person not directly involved in the case and therefore according to Respondent policy, could sign off on the Notice of Action. Joseph Zilembo decided to bring the charges and would also be the person who was reviewing the transcript preventing him from participating in the hearing itself. According to Zilembo when he recommends charges he is almost certain that a violation has occurred. Zilembo had no recollection of ever having recommended charges that he did not affirm after reviewing the transcript.

On Monday April 28, 2008, Complainant had the MRI and on May 7, 2008, Complainant was seen by Dr. Hamway for a follow up visit. Dr. Hamway's clinical notes state that Complainant was discussing surgical intervention but Dr. Hamway questioned this because there were few signs of an acute injury. Dr. Hamway wrote that the mechanism of injury was not consistent with a meniscal tear and questioned the timing of when Complainant reported the injury. Dr. Hamway wrote that if the meniscal tear occurred while working Complainant would have been in more significant pain. "The tear will not be considered occupational for above reasons. The mechanism of injury (non-traumatic) is consistent with at most a minor knee strain. The case will be considered non-occupational as of employee's next visit to OHS on

5/14/08 10:30AM." Dr. Hamway also noted that Complainant remained qualified for restricted duty but is not being utilized.

Complainant met with Dr. Lahav from his orthopedic group on Monday May 12, 2008, and was informed that he had a medial meniscal tear and medial collateral ligament sprain, a torn ACL. Complainant opted for surgical repair. On May 14, 2008, Complainant went to his scheduled follow up visit with Dr. Hamway and advised that surgery was to be scheduled. According to Complainant, Dr. Hamway's response was to tell Complainant to go through his own insurance. Dr. Hamway completed the MD-40 but for the first time designated the injury as non-occupational. In doing so all claims associated with Complainant's injury had to be submitted to his private insurance carrier. In a letter dated May 15, 2008, Dr. Hamway stated that as of May 14, 2008, Complainant's occupational case concerning his left knee strain was considered resolved and all future office visits and procedures were to be charged to the private medical insurance.

On May 14, 2008, at 12:20 PM, Complainant appeared for his disciplinary hearing. Joseph Zilembo reviewed the transcript and affirmed the discipline ordering 15 days deferred suspension. Zilembo decided discipline was warranted for failure to immediately report the injury based on Complainant's testimony that after he got home from work on April 12, 2008, he iced his injury. Zilembo felt that Complainant knew of his injury no later than when he got home on the 12th and that he should not have waited to call until 3:00 AM. Zilembo also advised during his interview that he wasn't sure that discipline was warranted for failing to go to OHS but that only Dr. Hamway could have retracted the disciplinary action. Zilembo stated that he would have preferred to have had Kazik call him at home once she knew of the injury so that he could have reported it to his manager and then reported out on the Monday morning briefing. No disciplinary action was taken against Kazik for failing to immediately report the injury to her supervisor.

On May 16, 2008, Respondent imposed the five day deferred suspension. In accordance with the transportation Workers Union Collective Bargaining Agreement, after two years the disciplinary action would be removed from Complainant's file as long as no new discipline was assessed. So long as the disciplinary action remains on Complainant's record he is ineligible for promotion or craft transfer. Additionally, the Chief Safety and Security Officer, Mark Campbell, reviews all applications for craft transfers and promotions. Campbell considers the Injury Frequency Index No.[3], how the employee's injury record compares to his/her peers, whether the injury was preventable, the severity of the injury and the elapsed time from date of injury(s) to the date of application. Campbell is provided with a summary of the injuries as reported through the IR1 and IR2, Campbell assigns each applicant to a category: good, concern and serious concern. The categories of concern and serious concern are meant to act as a red flag to the Human Resources Department when determining an applicant's eligibility and worthiness for the job they are applying to.

Also, on Friday, May 16, 2008, Angela Pitaro, RN MS Health Services Administrator approved Complainant's request for FMLA. Pitaro's clinical notes stated that the FMLA paperwork was received on May 6, 2008. She affirmed that Complainant had a work related injury and that he had been requesting FMLA for visits with specialists and procedures and approved the request. On May 22, 2008, Complainant underwent surgery for his injury. All medical related expenses were charged to his private insurance. Complainant is responsible for all co pays.

[3] The Injury Frequency Index No. is an index developed by Metro-North that relates an employee's number of injuries to the number of years in service. The higher the index number, the greater number of injuries an employee suffered.

On July 1, 2008, Complainant filed his FRSA complaint alleging that the five day deferred suspension was in retaliation for reporting an injury Complainant suffered while performing his job. On July 8, 2008, Complainant filed an amendment to include the allegation that the change of classification from occupational to non-occupational had caused out of pocket expenses and limited Complainant's choice of physicians to the private insurance carrier's network. Respondent asserted that Complainant's filing of an appeal before the Special Board of Adjustment constituted an election of remedies and prevented investigation of Complainant's FRSA complaints. As of April 21, 2009, Complainant has withdrawn the filing of any appeal before the Board.

Complainant was brought up on charges for an unrelated incident in which Respondent asserted that Complainant left work early without permission. Prior to the investigative hearing Complainant signed a waiver which included an acceptance of guilt and disciplinary action of 15 day suspension-deferred. However, as per the Transportation Communications Union Collective Bargaining Agreement Rule 50 (h) (2), since Complainant had received a 5 day suspension within the succeeding six month period and committed another offense for which discipline by suspension was imposed, Complainant had to serve the initial suspension.

Respondent argues that it did not retaliate against Complainant and states that such retaliation is prohibited under its Internal Control Plan (ICP), which provides for a policy against harassment and intimidation in order for there to be complete and accurate reporting of accidents, incidents, injuries, and occupational illnesses and to prevent employees from being discouraged from obtaining proper medical treatment or the reporting of an accident, incident, injury or illness. It is required by the FRA to disseminate the policy to its employees. Respondent usually distributes its General Safety Instructions during orientation. Interviews of Respondent witnesses found that only Joseph Zilembo was both aware of the existence of the policy and its provisions and had received a copy. Rule 200.5 of the General Safety Instructions is the Policy Against Harassment. Unlike in the ICP, this also states that certain practices of Respondent are not violations of the policy against harassment, including taking steps to enhance a sense of personal responsibility for safe work practices, such as employee training, coaching, and counseling for those engaging in unsafe work practices or rules violations. Additionally, Respondent will hold employees accountable through a reasonable discipline program for rules violations.

It is undisputed that Complainant injured his left knee at approximately 1:00 PM on Sunday, April 12th and that Complainant was seen limping after the injury. Complainant reported that although he felt pain at the time of the injury he thought this was a minor incident and that the pain would go away shortly. Neither the foreman nor the supervisors worked on the weekends and it seemed unnecessary to call them at home. There is no evidence that a policy or procedure exists concerning the reporting of an injury when there is no supervisor or foreman on duty. Complainant's shift ended at 3:00 PM and he went home with minor discomfort, unaware at that point that he had an injury to report. Complainant awoke in severe pain at 3:00 AM Sunday morning and realized that he was injured and needed to go to the hospital. In accordance with Respondent policies, Complainant called Leavey to report his injury prior to seeking medical attention.

Respondent asserts that they imposed discipline because Complainant failed to immediately report his injury in accordance with General Safety Instruction 200.3 and 200.4 which states an employee must "immediately report" the injury. However, Respondent's Operating Procedure states "Employees must report all injuries to their immediate supervisors promptly after they occur and before seeking medical evaluation and treatment". Complainant followed both the Operating Procedure and the General Safety Instructions. Once he believed he was injured Complainant notified his foreman and then sought medical attention. Complainant couldn't report an injury until he had perceived that he was injured. Indeed, Zilembo's belief that the threshold for realizing Complainant was injured was when he applied ice to it

after he got home supports the premise that the prompt or immediate reporting of an injury is based on an individual's perception of when they believe they are injured. The fact that he disagrees with Complainant over when that threshold was reached does not invalidate that premise.

The Post Incident Management Supervisor's Guide requires "prompt reporting" and not "immediate reporting" of injuries. The Incident Investigation and Reporting Manual requires the employee and the investigator, who in this case was Kazik, immediately report the injury. Complainant reported his injury immediately upon becoming aware of his injury. Kazik didn't report the injury to Zilembo until after Zilembo had already attended the Monday morning Operations Meeting in which incidents and accidents from Friday through Sunday are discussed. It was more than 24 hours later when Zilembo was informed. The Manual states that the investigators are to promptly report the incidents to the safety department, but it also states that the department heads are to ensure that the guidelines and policies are adhered to. In this case Kazik failed to inform Zilembo of the injury until more than 24 hours after she had accompanied Complainant to the hospital. The investigator/supervisor has far more clear instructions for reporting and is accountable for prompt reporting up their chain of command, yet Kazik failed to do so and no discipline was imposed for her actions. Kazik had never even seen the Manual or the Guide and knew only that she was to accompany the employee to the hospital in the case of injury. Furthermore, the Post Incident Management Supervisor's Guide recognized that employees may not be aware that they require treatment for several days after the initial incident and provides guidance on how to handle the situation.

49 U.S.C. § 20109 (a) (1) (C) (4) protects employees who notify the railroad carrier or the Secretary of Transportation of a work-related personal injury. Complainant notified both the Secretary of Transportation and Metro-North. Respondent asserts that the timing of the report violated safety rules. As recognized by the Federal Railroad Administration and the House of Representatives, railroad employees are harassed and intimidated making them reluctant to report accidents and injuries and then upon their reporting they are subject to disciplinary actions. Complainant reported the injury and was subsequently disciplined. Respondent argues the discipline was not for reporting the injury but for not reporting the injury immediately. Complainant is credible in his belief that he didn't know that he had an injury until he awoke at 3:00 A.M. in severe pain. Severe pain equated to an injury for Complainant and he immediately called his lead custodian and then sought medical attention. Complainant's actions appear to comply with Respondent's operating procedure and the general safety rules. If Complainant had not reported the injury and filed all medical related claims through his private insurance Complainant would not have been disciplined. The reporting of Complainant's injury was therefore, a contributing factor in the discipline and absent his reporting of the injury no disciplinary action would have been imposed. Additionally, Respondent attempts to intimidate and harass the employees by presenting them with waivers before the disciplinary hearings. If the employee admits their guilt they will be issued a known form of discipline. If they refuse to sign the waiver they face the hearing and the consequences that will be imposed. The charges are either approved or recommended by the same person who will be reviewing the hearing transcript, and are a foregone conclusion. This is not an impartial review and is viewed as a formality required by the collective bargaining agreement.

Discipline was imposed for violating the order to go to OHS. However, going to OHS would have caused Complainant to not follow his doctor's treatment plan. Complainant had been advised when at the ER to seek follow-up treatment with his doctor. Complainant scheduled a visit with his orthopedist, Dr. Weisman for Tuesday, April 15th. Dr. Weisman's orders were that Complainant was to remain out of work and not to travel to NYC until he was re-evaluated on April 18th. Complainant's rest days were Monday and Tuesday and his regular schedule would have had him reporting for work for the first time on Wednesday, April 16th. According to the post-injury instructions Complainant would have had to report to OHS on the 16th since he was not capable of working. However, his treating physician Dr. Weisman issued a treatment plan stating that he should not travel to NYC. Despite the treatment plan

issued by Dr. Weisman, Dr. Hamway called the operations department and instructed Joseph Zilembo to order Complainant to OHS. Instead of going to OHS Complainant followed Dr. Weisman's treatment plan. Complainant received many calls that he characterized as harassment compelling him to go to OHS. He received calls from his lead custodian, Chris Leavey, his supervisor Maria Kazik, Employee Specialist Olive Durant and possibly others all telling Complainant that if he didn't go to OHS he would be disciplined. Dr. Hamway wrote in his notes that if Complainant was able to go to his doctor's office he was able to sit on a train and come to OHS. Dr. Hamway completely disregarded the fact that going to see Dr. Weisman was a much easier task requiring few steps from the parking lot into the office. As testified to at the hearing, a trip to OHS required a great deal more walking. When Complainant failed to go to OHS on April 16th he was ordered again to go on April 21st. Complainant was examined again by Dr. Weisman on April 18th who ordered Complainant to keep his leg elevated and iced. Complainant followed the treatment plan of Dr. Weisman, the treating physician. Complainant was ordered again to OHS this time for April 23rd. Complainant was feeling better and made the trip with the use of a brace on his leg despite the treating physician's order to elevate and ice the knee. Respondent imposed discipline because Complainant did not go to OHS as directed on April 21st. Zilembo advised that he had no choice but to bring Complainant up on charges over the matter because Dr. Hamway wanted him to. Zilembo also stated that the only way he could have dropped the charges was if Dr. Hamway instructed him to do so.

49 U.S.C. § 20109 (c) (1) prohibits a railroad carrier or person covered under this section from denying, delaying or interfering with the medical or first aid treatment of an employee who is injured during the course of employment.

And

49 U.S.C. § 20109 (c) (2) prohibits a railroad carrier or person covered under this section from disciplining, or threatening to discipline, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

Respondent discriminated against Complainant when discipline was imposed for not following the order to go to OHS because he was following the treatment plan of his treating physician. Respondent interfered with the treating physician's treatment plan by ordering Complainant to go to medical with complete disregard for Dr. Weisman's treatment plan provided to OHS. Respondent management employees and Complainant's foreman, all first-line management, attempted to intimidate Complainant into abandoning the treatment plan. Eventually Complainant did just that by going to OHS on April 23rd. Once Complainant reported to OHS, Dr. Hamway confirmed that the injury was suffered during the performance of Complainant's job on 4/12/2008. Dr. Hamway consistently recorded the injury as occupational until Complainant raised the possibility of surgical intervention, which would be costly for Metro-North. Dr. Hamway recorded in his clinical notes that Complainant discussed the possibility of surgery but that Dr. Hamway wasn't going to approve the treatment plan. Dr. Hamway informed Complainant of this on May 14th when Complainant stated he had chosen surgery after consulting with his treating physician. Dr. Hamway's actions not only significantly reduced the cost to Respondent; it cost Complainant out of pocket expenses and limited his in-network selection of physicians.

After Complainant engaged in activities that are protected by the FRSA, Respondent imposed a 5 day suspension– deferred and eliminated medical coverage paid for by Respondent. This was achieved by changing the injury designation from occupational to non-occupational. Respondent did not submit a defense for the charges pertaining to Complainant's failure to comply with the order to go to OHS nor did they address the fact that they allegedly interfered with the medical treatment. Dr. Hamway's actions, approved by Metro-North, resulted in medical costs to Complainant. Respondent has forced Complainant to file claims with his private insurance carrier that are potentially fraudulent since the injury was suffered

during the performance of duty. Absent complainant's protected behavior's he would not have been disciplined.

Moreover, Respondent's Operating Procedure for attendance and policy for determining whether an employee is eligible for consideration for promotion and craft transfers are on their face a violation of the FRSA and it is recognized that such practices produce a chilling effect on reporting injuries in the workplace, jeopardizing employee safety. Respondent's reckless disregard for the rights of its employees calls for punitive damages.

Order

Respondent shall expunge all files and computerized data systems of disciplinary actions, and references to disciplinary actions relative to April 12-13, 2007. The expungement shall include, but not be limited to, the 5-day suspension, the formal disciplinary hearing, and any memorandums or letters referencing the disciplinary action.

Respondent shall amend and/or expunge statements on the IR1 & IR2 to reflect that no violation of policy and/or procedure contributed to Complainant's injury.

Respondent shall make payment to Complainant for back wages in the gross amount of 1,060.80.

Respondent shall make payment to Complainant for interest at the rate of 6% on the gross amount of back wages.

Respondent shall reduce the 15 day suspension related to events of October 17, 2008 to a five day suspension since discipline is progressive.

Respondent shall make payment to Complainant for all medical related expenses due to the change in classification from occupational to non-occupational.

Respondent shall amend their Attendance Policy so that sick leave attributed to an occupational injury or illness shall not be included when assessing unsatisfactory attendance, requests for craft transfers or requests for promotion.

Respondent shall amend its eligibility policy for craft transfers and promotions so that the reporting of an occupational injury or illness shall not be considered when assessing requests for craft transfers or promotions.

Respondent shall permanently post the Notice to Employees included with this Order in all 120 stations in areas where employee notices are customarily posted.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet and the Frequently Asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry included with the Order.

Respondent shall pay Complainant's reasonable attorney's fees.

Respondent shall pay compensatory damages to Complainant in the amount of $5,000 for the inconvenience of and the mental anguish arising from Respondent's intimidation and harassment of Complainant following the reporting of his occupational injury.

Respondent shall pay punitive damages in the amount of $75,000 to Complainant.

Respondent shall within 30 days inform the Regional Administrator in writing of the steps it has taken to comply with the above order.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
(202)693-7542, Facsimile (202)693-7365

With copies to:

Complainant

Department of Labor, Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at http://www.osha.gov/dep/oia/whistleblower/index.html.

Sincerely,

Robert D. Kulick

Robert D. Kulick
Regional Administrator

cc: Charles C. Goetsch, Esq. (Via Federal Express #8696 2181 9320)
USDOL/OALJ-Chief Administrative Law Judge
USDOL/SOL-FLS
US DOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration